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In the
Supreme Court of the United States

October Term, 1972

No. 72-1005

SIERRA CLUB AND CITIZENS FOR
CLEAN AIR AND WATER,
Petitioners

v.

ROGERS C. B. MORTON,
SECRETARY OF INTERIOR, ET AL.,
Respondents

BRIEF OF THE TOLEDO EDISON COMPANY AND THE CLEVELAND ELECTRIC ILLUMINATING COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

STATEMENT

A complete statement of the facts is given here to show that there are no special or important reasons why certiorari should be granted in this case brought by petitioners. The facts standing alone show that the trans-

action involved herein need not occupy the time of this Court or any further time of the courts below.

In 1968, The Toledo Edison Company and The Cleveland Electric Illuminating Company, two electric utilities serving northern Ohio, acquired a privately owned 480-acre tract in Ottawa County, Ohio, along Lake Erie, known as the Darby Marsh. The United States in 1967 had acquired a formerly privately owned tract known as the Navarre Marsh, in the same county, consisting of about 455 acres of marshland and about 77 acres in one corner consisting mostly of upland. (A. 18a-19a)

The following land exchange took place between the utilities and the United States in the fall of 1968 (A. 19a):

The utilities received:

(1) Title to the Navarre Marsh (roughly 77 acres of mostly upland and 455 acres of mostly marshland).

The United States received:

(1) Title to the Darby Marsh (about 480 acres to be used as a wildlife refuge).

(2) The right under a rent-free lease to continue to use the entire 455 acres of marshland of the Navarre Marsh as a wildlife refuge for 50 years, except for a strip for a water channel (including buried intake and discharge pipes) and a reservation for facilities such as transmission lines, which by reason of the location of the marsh and the areas to be served by the utilities would probably affect very little, if any, of the land. Some service roads were required by the United States for wildlife management use.

(3) The right under a rent-free lease to use marshland adjacent to Navarre Marsh (135 acres) as a wildlife refuge for 25 years.

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(4) The utilities would spend up to $175,000 to rebuild 3,200 feet of dike on the Darby property and maintain the dikes on the Navarre Marsh.

(5) The utilities at their expense would install three electric pumps at the Navarre Marsh to maintain proper water levels for wildlife refuge management.

The utilities thereafter proceeded with site preparation and later commenced construction of the Davis-Besse nuclear generating plant on the upland portion of the Navarre property and on adjacent land. Petitioners' amended complaint in this case attacking this exchange was filed in April of 1971 (almost two and a half years after the exchange). In order to complete the plant on schedule, to be able to serve the needs of the population in their service area and the commerce and industry dependent upon them for electric power, the utilities have felt compelled to continue to expend large sums in continuing the construction of the plant.

The Atomic Energy Commission is conducting an investigation of the environmental effects of the plant and hence this aspect of the plant location and construction has been and will be taken into account. (AEC Docket No. 50-346). The rules of that agency give organizations such as petitioners the right to intervene in environmental hearings and present evidence on that subject.

In summary, before the exchange the United States had about 455 acres of marshland (plus about 77 acres of mostly upland) for use as a wildlife refuge and the utilities had a 480-acre marshland tract (with some upland) for use in the construction of a nuclear generating plant. After the exchange the United States had the use of over 1,000 acres of marshland (including the same marsh exchanged) for wildlife refuge purposes along with a free new dike and pumps, and the utilities had 77

acres of upland (plus adjacent land purchased by the utilities from private persons) on which to build their plant, the environmental effects of which are being taken into account by the Atomic Energy Commission, the governmental body having jurisdiction over such projects.

While it is the position of the utilities that the decision of the United States Court of Appeals for the Sixth Circuit is clearly correct as a matter of law, even if it were not, the foregoing facts show that there are no special or important reasons why certiorari should be granted in this case, and justice and the welfare of the public will be served by denying the petition.

II

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

A. Summary of Argument

The substance of petitioners' complaint in the district court was that even though the Secretary of the Interior had broad power to exchange lands which he found suitable, the exchange should be set aside in spite of the fact that it nearly doubled the marsh refuge area in the same county. They claimed building an atomic plant adjacent to the Navarre Marsh rather than adjacent to the Darby Marsh (both of which continue as wildlife refuges) would not foster the *general wildlife conservation goals* of his office. Respondents assert that if this type of claim by an environmental group, two and a half years after the exchange, were held to state a cause of action, it would render the exchange statute meaningless as no purchaser could ever tell in advance if he had secured a good title. Congress did not intend to do a frivolous thing in passing the statute. The situation is different from ascertaining if specific conditions precedent had been complied with by

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a government official. Petitioners' allegations did not state a cause of action and justice is served by the circuit court's decision.

The circuit court's decision that sovereign immunity protected this exchange does not require review by this Court. One of the most narrow and well established applications of the doctrine is involved in this case, *i.e.* that relief could not be granted by merely ordering the cessation of conduct complained of, but would require affirmative action by the sovereign in the disposition of unquestionably sovereign property. Modern recognition of the applicability of this rule is found in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1948); *Hawaii v. Gordon*, 373 U.S. 57 (1963); *Dugan v. Rank*, 373 U.S. 609 (1963), and *Malone v. Bowdoin*, 369 U.S. 643 (1962).

Even though petitioners only ask that the utilities return the title to the land they received, well established principles of law recognized by this Court, the Ohio Supreme Court and numerous other courts require that if the exchange is set aside the Government would also have to reconvey to the utilities the land it received. Hence the forced conveyance of unquestionably sovereign property would result.

An additional reason for the applicability of sovereign immunity to this case is that the acts of the Secretary here did not come within the *ultra vires* exception to the rule. He had broad discretionary general authority to make the exchange without any specific conditions precedent. Whether or not the exchange was desirable or undesirable in fostering his general goals did not make it an *ultra vires* act. This case differs from *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). There the statute *prohibited* the act of the official *unless* certain *conditions precedent* were complied with. If he failed to do so, his acts were *ultra vires*. Also the relief there could be granted by ordering the cessation of con-

duct and did not require the disposition of unquestionably sovereign property.

Petitioners rely on cases involving construction of rights of grantees in federal land for mining, grazing and the like. This line of cases is distinguishable as it is based on the concept that due process and the statute giving the grantee rights in federal lands gives him the right to protect such a grant as against the Government itself. There are no such factors here.

The claim of petitioners that this Court should review this case because there is a conflict among the Federal Courts of Appeals as to the effect of the Administrative Procedure Act on the doctrine of sovereign immunity is not justified. This Court in *Blackmar v. Guerre,* 342 U.S. 512 (1952), recognized that the Administrative Procedure Act should not be deemed an implied waiver of all governmental immunity from suit. Any conflict among the circuits is one of language rather than of substance, as those cases which speak of waiver would come within the *ultra vires* exception to immunity anyway. Even more important, there is no case holding that the Administrative Procedure Act waived immunity in a case such as this where relief could not be granted by merely ordering cessation of conduct but affirmative action of the sovereign would be required in the disposition of unquestionably sovereign property.

There clearly are no special and important reasons for granting certiorari. The utilities acted in good faith in relying on the broad general authority of the Secretary to make the exchange and, after having deemed it necessary to spend millions of dollars to serve the public in reliance thereon, should not be harassed with further proceedings in this case.

B. The Amended Complaint Did Not State a Cause of Action.

The statute pursuant to which this exchange of land was made would be rendered virtually meaningless if construed as advocated by petitioners. If one securing title from the United States under a statute such as in this case, giving the Secretary of the Interior the power to exchange land "which he finds suitable for disposition" (16 *U.S.C.* § 668(b)(3)), could have his title defeated two and a half years after he acquired it by a claim that the Secretary's determination was not a wise one in carrying out the general duties and goals of his office, no one could ever risk making such an exchange. No lawyer could ever approve such a title. Congress would have done a frivolous and futile thing in passing the exchange statute.

Where there are *specific statutory conditions precedent* to a government officer performing an act (such as conveying land), a prospective purchaser can protect himself in advance by checking to see that they have been complied with. If they have not, the transaction can be attacked. However, where as here, the only requirement is that he "finds it suitable for disposition", there would be no way in which a purchaser could make a determination on which he can base a good title. He cannot guess in advance if the transaction would be held by a third person to tip the scales more on the desirable side than on the undesirable side in carrying out the general conservation duties of the Interior Department. To take title away from a purchaser under such circumstance would not be consistent with the most rudimentary principles of justice or reason.

The decision of the district court in dismissing the amended complaint and the affirmance of that decision by the appellate court achieved a just and proper result, as no cause of action was stated by allegations that the

exchange did not foster the general goals of the Secretary set forth in the statute.

C. The Decision In This Case Does Not Involve A Question of Law Which Has Not Been Settled By This Court, And It Is Not In Conflict With a Decision of This Court or Any Other Federal Court of Appeals.

1. Sovereign Immunity

(a) Affirmative Action In Disposing of Sovereign Property

The factual situation in this case does not require a new decision by this Court on the doctrine of sovereign immunity. It clearly falls within the most well established and narrowest application of the doctrine, as set forth in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1948):

> "Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. *North Carolina v. Temple*, 134 U.S. 22 (1890)."
>
> 337 U.S. 682, footnote 11 at 691
> (Emphasis added.)

The rule was again recognized and applied in *Hawaii v. Gordon*, 373 U.S. 57 (1963):

> "° ° ° We have concluded that this is a suit against the United States and, absent its consent, cannot be maintained by the State. The general rule is that relief sought nominally against an officer is in fact against the sovereign, if the decree would operate against the latter. E.g., *Dugan v. Rank*, 372 U.S. 609 (1963); *Ma-*

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lone v. Bowdoin, 369 U.S. 643 (1962), *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949). Here the order requested would require the Director's official affirmative action, affect the public administration of government agencies and *cause as well the disposition of property admittedly belonging to the United States.*"

337 U.S. 57, 58
(Emphasis added.)

It was also applied in *Dugan v. Rank*, 373 U.S. 609 (1963), and in *Malone v. Bowdoin*, 369 U.S. 643 (1962).

It is apparent from the allegations of the complaint that the United States is now the owner in fee simple of the Darby Marsh and of a lease on most of the Navarre Marsh and adjoining marshland. There is no contest as to its present ownership. However, if the exchange were held illegal and set aside as requested, the foundation on which the Government's title rests would fall and its title would be destroyed. Equity would require the Court to order its reconveyance. This elementary proposition of logic and law has long been recognized by this Court, the Supreme Court of Ohio and other courts. In *Chapman v. County of Douglas*, 107 U.S. 348 (1882), a governmental body (a county) was held obligated to reconvey property acquired by an unauthorized contract. The same was held as to property received in an exchange of lands in *Stevens v. McCoy*, 60 Ohio St. 540 (1899), and the general recognition of the rule by other courts is set forth in 30 *Am. Jur.* 2d, *Exchange of Property*, Section 41:

"° ° ° No action for rescission of a contract of exchange of property is maintainable unless the party seeking the recission restores, or offers to restore, the other party to its original position by returning, or offering to return, whatever land, personalty or other property he may have received on the exchange from the other party."

This Court also recognized the applicable equity rule in *Rice & Adams v. Lathrop*, 278 U.S. 509 (1929):

> "° ° ° This conclusion finds support in the principle that 'a court of equity ought to do justice completely and not by halves,' and to this end, having properly acquired jurisdiction of the cause for any purpose, it will ordinarily retain jurisdiction for all purposes, including the determination of legal rights that otherwise would fall within the exclusive authority of a court of law. ° ° °"
>
> 278 U.S. 509 at 515

This doctrine was applied in *Katchen v. Landy*, 382 U.S. 323 (1966) at page 338. Equitable rules have long been recognized to apply to the United States, *U.S. v. Detroit Timber and Lumber Co.*, 200 U.S. 321 (1906), and *Jacobs v. U.S.*, 239 F.2d 459 (4th Cir. 1956), *cert. denied* 353 U.S. 904 (1957).

This is not a case where the utilities claim property was taken from them by the Government, giving rise to a claim for just compensation in the Court of Claims, as asserted by petitioners (Pet. 9). The utilities' claim to title is one based on a valid exchange of lands.

As this Court held in *Larson v. Domestic & Foreign Commerce Corp., supra.*, 337 U.S. 682 (1949), the question of whether or not the suit is against the sovereign is not determined by the form of the relief sought (here claimed only to be against the utilities), but whether it is "° ° ° in substance, a suit against the Government, over which the Court in the absence of consent has no jurisdiction." (at 687-688). Here the exchange itself is attacked and the substance is such that if the relief sought were to be granted it would require affirmative action by the sovereign and the disposition of unquestionably sovereign property, and hence the doctrine of sovereign immunity was properly applied.

Recent cases supporting the application of the doctrine of sovereign immunity to the instant case, where this Court

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denied certiorari, are: *Simmonds v. Vinson*, 394 F.2d 732 (5th Cir. 1968), *cert. denied* 393 U.S. 968 (1968), and *Switzerland Co. v. Udall*, 337 F.2d 56 (4th Cir. 1964), *cert. denied* 380 U.S. 914 (1965).

(b) Ultra Vires Exception to Sovereign Immunity

There are, of course, many cases where a federal official exceeds his authority and affirmative action in disposing of sovereign property is not involved, *i.e.*, the *ultra vires* exception to sovereign immunity. This Court recognized such an exception in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1948), discussed above:

> "* * * On a similar theory, where the officer's powers are *limited by statute*, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief. It is important to note that in such cases the relief can be granted, without impleading the sovereign, *only because of the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient.* * * *"*
>
> 337 U.S. 682, at 689-690
> (Emphasis added.)

This *ultra vires* exception to sovereign immunity is not applicable to the instant case. The Secretary was given the clearest and broadest possible authority by the language of 16 *U.S.C.* § 668dd(b)(3) to exchange lands "which he finds suitable". There were no express conditions precedent which had to be complied with. An analogous broad delegation of authority to the Postmaster General was claimed to be exercised in a manner which was "unlawful, arbitrary and capricious" and "in violation of Executive Order No. 10988", which outlined his *general powers and goals*,

in the case of *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451, 454, 455 (D.C. Cir. 1965), *cert. denied* 382 U.S. 978 (1966). The complaint was dismissed because of sovereign immunity and it was held that "an officer of the United States does not act outside his authority whenever he acts upon an erroneous decision of law or fact if he is empowered to make the decision." (350 F.2d 456)

The court of appeals decision in the case at bar is not inconsistent with the case of *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), as claimed by petitioners. (Pet. 9). The question of sovereign immunity was not raised or decided in that case, but it is apparent that it would not have affected the result if it had been. The action was for an injunction against the Secretary of Transportation to enjoin him from releasing federal funds for the construction of a highway through a park and also to enjoin the Tennessee Highway Commissioner from building this segment of the highway with such funds.

The allegation was that the Secretary had failed to comply with two express conditions precedent required before approving such use of federal funds, *i.e.*, a proper determination if a feasible and prudent alternative route existed and, if none, then that all possible planning had been done to minimize harm to the park. These allegations clearly brought the case within the *ultra vires* exception to the doctrine of sovereign immunity. The Secretary was expressly forbidden by statute to release funds for this purpose unless he had complied with these conditions and if he failed to do so he was acting outside of his authority and such *ultra vires* action could not be protected by sovereign immunity. The relief sought could be granted by merely ordering the cessation of the conduct (disbursing the funds) and no affirmative action of the sovereign was required in disposing of unquestionably sovereign property.

The action of the Tennessee Commissioner was also tied in with building the road with federal funds which were not properly authorized. There was no attempt to secure an order specifically requiring him to dispose of state property. The relief sought was only to prevent him from improperly receiving federal funds to develop such property.

In the case at bar the statute did not specify any express conditions precedent and hence there was no *ultra vires* act. The relief requested would not order the cessation of the illegal use of federal funds in developing property but would require affirmative action by the sovereign in disposing of the title. Hence this case is clearly distinguishable from *Overton*.

Littel v. Morton, 445 F.2d 1207 (4th Cir. 1971) (Pet. 10, 17), was a case falling in the category of a government official acting beyond the authority specifically imposed upon him, in denying a lawyer's claim to fees for services performed for an Indian tribe.

Another such case is *National Forest Preservation Group v. Batz*, 343 F. Supp. 696 (D. Mont. 1972) (Pet. 13, 14), where plaintiffs sought to *enjoin* a conveyance by the Government and claimed a failure on the part of the government official to perform specific acts required of him under the laws and regulations relating to the type of exchange in question. The court concluded that there were no such violations which were prejudicial and that plaintiffs' dissatisfaction with the exchange was not a ground for setting aside the decision of the Secretary of Agriculture.

The case of *Knox Hill Tenant Council v. Washington*, 448 F.2d 1045 (D.C. Cir. 1971), cited at page 11 of the petition, is also not analogous. The court points out that the federal statute specifically required the officials to maintain decent, safe and sanitary dwellings; they were required to police the performance of contracts for this purpose, and

had specific authority to deal with violations. The court held that the allegations of the complaint were sufficient to charge the officials with acting *outside of their specific authority* and that the relief sought *would not interfere with the Government's title or possession of the properties.* Thus the court states at page 1052:

> "° ° ° In neither purpose nor effect will the prosecution of this suit disturb or diminish either the Government's title or its possession. ° ° °"

The mere fact that the Government owned the property was in itself not enough to bar the suit. It was a question of carrying out specific duties in regard to the properties. In the case at bar the effect of the suit would be to affect the *title and possession* of government owned property; it does not merely relate to management thereof.

Assertions by petitioners at pages 12, 13 and 14 of the petition in regard to other land exchanges by the Government which are not a part of the record of this proceeding have no relevancy whatsoever. The only exchange involved in this suit is the one described in the Statement of Facts at the beginning of this brief, which clearly does not present a special or important reason for granting certiorari.

(c) Cases Construing Government Grants

Petitioners rely heavily on a line of cases in federal courts determining claims of parties relating to their rights in federal lands, such as mining, homestead, grazing and forestry. It is concluded that these cases illustrate the right of the courts to make determinations in regard to federal lands. However, this line of cases is completely distinguishable from the case at bar. They are based on the concept that the statute giving the grantee rights in federal lands gives him a right to protect such a grant against the sovereign itself. He has a right to have a court determination of the validity of his rights.

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Thus in the case of *Coleman v. U.S.*, 363 F.2d 190 (9th Cir. 1966), cited at page 10 of the petition, the court states at page 196:

> "It has long been established that a qualified entryman upon public lands of the United States, whether as a locator of a mining claim, as a homesteader, or as one asserting rights under others of the multifarious laws governing entries on public lands, who perfects his entry by compliance with the applicable Act of Congress, thereby acquires a right to the land as against the sovereign itself, as well as third persons. ° ° °"
>
> 363 F.2d 190 at 196

It is the due process protection of the *grantee or acquiree's rights* which is undertaken by the courts – not affirmative action in disposing of admittedly sovereign property. This due process right is recognized in *Larson v. Domestic & Foreign Commerce Corp., supra,* 337 U.S. 682 (1948), at page 607.

This difference will be seen in all such cases cited by petitioners: *Adams v. Witmer,* 271 F.2d 29 (9th Cir. 1958) (Pet. 10), mining claim; *Brennan v. Udall,* 379 F.2d 803 (10th Cir. 1967) (Pet. 11), oil rights; *Lewis v. Hickel,* 427 F.2d 673 (9th Cir. 1970) (Pet. 13), grazing rights; *LaRue v. Udall,* 324 F.2d 428 (D.C. Cir. 1963) (Pet. 13), grazing rights; *Boesch v. Udall,* 303 F.2d 204 (D.C. Cir. 1962) (Pet. 14), oil and gas lease; *McNeil v. Seaton,* 281 F.2d 931 (D.C. Cir. 1960) (Pet. 14), grazing rights; and *McKay v. Wahlenmaier,* 266 F.2d 35 (D.C. Cir. 1955) (Pet. 14), oil and gas lease.

(d) Effect of Administrative Procedure Act

Petitioners' contention at pages 15 through 17 that the Administrative Procedure Act constitutes a general waiver of sovereign immunity does not present any special or important reason why certiorari should be granted in this case. This Court has already rejected such a contention. In *Blackmar v. Guerre,* 342 U.S. 512, 515-516

(1952), it was stated, "Still less is the Administrative Procedure Act to be deemed an implied waiver of all governmental immunity from suit."

The several decisions by this Court applying the doctrine of sovereign immunity, discussed above (at 8 and 9), were all decided after the passage of the Administrative Procedure Act. The case at bar is of the type to which the courts have consistently and traditionally applied the doctrine both before and after the passage of the Administrative Procedure Act, *i.e.* one requiring affirmative action by the sovereign in disposing of unquestionably sovereign property.

Judge Green, in giving the district court's opinion dismissing the petitioners' first complaint in this action, cites pertinent legislative history showing that there was no legislative intent to do such an extreme act as to wipe out sovereign immunity without even mentioning it. That opinion states:

> "The Court has reviewed the legislative history of the A.P.A., Senate Doc. 248, 79th Cong., 2nd Sess., (1944-1946), and finds no indication therein that the judicial review provisions, Section 10 of the Act, were intended to have any substantive effect. In fact, the contrary appears. Carl McFarland, a member of the Attorney General's Committee and Chairman of the American Bar Association's special committee on administrative law, in testimony before the House Committee on the Judiciary stated:
>
> > . . . we do not believe that the principle of review or the extent of review can or should be greatly altered. We think that the basic exception of administrative discretion should be preserved, must be preserved. We believe that about all the statute should or could do would be to state the form of the action, *the type of acts that are reviewable in accordance with present law*, the authority of the courts to grant temporary relief so that review may be useful, *but that the scope of review should be as it is now.* (Emphasis added.)

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> In a letter from the Hon. Tom C. Clark, then United States Attorney General, incorporated into the report of the Senate Committee on the Judiciary, it is stated that Section 10 of the A.P.A. was intended to, and did, reflect existing law on the availability of judicial review of administrative actions."

In the case of *Twin Cities Chippewa Tribal C. v. Minnesota Chippewa Tribe,* 370 F.2d 529 (8th Cir. 1967), the Secretary of the Interior was one of the defendants. The court held in regard to the claim that the Administrative Procedure Act waived sovereign immunity, as follows:

> "* * * This reliance on § 10 of the Administrative Procedure Act to establish jurisdiction below is misplaced. Section 10 of the Act does not confer jurisdiction upon the federal courts. Its purpose is to define the procedures and manner of judicial review of agency action rather than confer jurisdiction. Ove Gustavsson Contr. Co. v. Floete, 278 F.2d 912, 914 (2nd Cir. 1960); Barnes v. United States, supra. Additionally, § 10 does not in itself amount to congressional consent to a suit against defendants, whose right to assert the defense of sovereign immunity is discussed above. * * *"
>
> 370 F.2d 529 at 532

As recognized by petitioners at page 17 of their petition, a similar holding is found in *Cyrus v. United States,* 226 F.2d 416, 417 (1st Cir. 1955), and in *Coalition for United Community Action v. Romney,* 316 F. Supp. 742, 746 (N. D. Ill. 1970); *Chournos v. United States,* 335 F.2d 918, 919 (10th Cir. 1964); *Cotter Corp. v. Seaborg,* 370 F.2d 686, 692 (10th Cir. 1966), and *Motah v. U.S.,* 402 F.2d, 1, 2 (10th Cir. 1968).

Petitioners, also at page 17 of their petition, claim that the decisions of the Tenth Circuit are divided on this issue and cite the case of *Brennan v. Udall,* 379 F.2d 803, 805 (10th Cir. 1967). There is no language in the opinion

stating that the Administrative Procedure Act waives sovereign immunity. The Court held that plaintiff was entitled to have his patent granted by the United States interpreted under the Act as to whether or not it included oil. As has already been discussed, permitting interpretations of land grants is based upon the theory that the laws permitting such grants gave a due process right to the patentee which was good against the Government as well as third persons and that it has long been recognized that he could assert such right against the Government. Hence, there is no such conflicting decision on the waiver issue in the Tenth Circuit – the holdings of the court in that circuit are that there is no such waiver. Also, in *National Helium Corp. v. Morton,* 455 F.2d 650, 654, 655 (10th Cir. 1971), the court recognizes the validity of *Larson v. Domestic & Foreign Commerce Corp., supra,* 337 U.S. 682 (1949), but distinguishes it on the grounds that Secretary Morton was specifically required by law to do certain things, which he failed to do, and hence that case fell within the exception to *Larson.*

Petitioners' claim (Pet. 16) that the Ninth Circuit case of *Washington v. Udall,* 417 F.2d 1310, 1320 (9th Cir. 1969), significantly narrows the defense of sovereign immunity is refuted by the language of the opinion. The court states at page 1320:

> "While we hold that the Secretary's challenged action in this case is subject to judicial review under the Administrative Procedure Act, *we strongly emphasize our opinion that such review is not available on the theory that the Act constitutes a consent of the United States to all suits of whatever nature and, as such, a blanket waiver of sovereign immunity.* In any case wherein the immunity doctrine is so transcending as to require dismissal of the suit, the Act does not provide for Administrative Review. The Supreme Court has not found jurisdiction under the Administrative Procedure Act in cases wherein the actions of

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the Secretary of the Interior have been held to be shielded from judicial review by sovereign immunity. *See* City of Fresno v. California, supra, 372 U.S. 627, 83 S. Ct. 996, 10 L.Ed. 2d 28; Dugan v. Rank, *supra*, 372 U.S. 609, 83 S. Ct. 999, 10 L.Ed. 2d 15. See also Blackmar v. Guerre, 342 U.S. 512, 515-516, 72 S. Ct. 410, 412, 96 L.Ed. 534 (1952) (8-1 decision concerning review of a Civil Service Commission decision) 'Still less is the [Administrative Procedure] Act to be deemed an implied waiver of all governmental immunity from suit,'; Motah v. United States, 402 F.2d 1 (10th Cir. 1968); Chournos v. United States, 335 F.2d 918 (10th Cir. 1964); L. Jaffe, Judicial Control of Administrative Action 372 (1965) (Administrative Procedure Act has had a negligible effect on the basic right to judicial review but does codify the presumption of reviewability.)"

417 F.2d 1310 at 1320
(Emphasis added.)

While the opinion in *Littell v. Morton*, 445 F.2d 1207 (4th Cir. 1971), has some ambiguous language, it still recognizes that where the doctrine of sovereign immunity is applicable it must be applied.

The Court of Appeals for the Fifth Circuit made a general statement regarding the A.P.A. waiving sovereign immunity, as pointed out by petitioners (Pet. 15, 16), in *Estrada v. Ahrens*, 296 F.2d 690 (5th Cir. 1961). That case involved an action by aliens to review a determination excluding them from the United States. However, in a case seven years later that same court of appeals applied the doctrine of sovereign immunity in the case of *Gardner v. Harris*, 391 F.2d 885 (5th Cir. 1968), to bar a suit brought to compel a federal superintendent of Natchez Trace Parkway to remove certain barricades which it was claimed exceeded his statutory authority and thus made him amenable as an individual to injunctive relief. The court states at page 888:

"° ° ° Undoubtedly if a Federal Court were to order the Superintendent to remove the barricades, this

> would be compelling the Government to act. Likewise it would be interfering with public administration since it would have an immediate physical bearing upon the governmental judgment on such matters as the number, type, and location of access ways from the standpoint of safety, traffic flow, and the like. ° ° °"
>
> 391 F.2d 885 at 888

Since these same things could be said about the judgment prayed for in the case at bar, we must assume that the Court of Appeals for the Fifth Circuit would also hold that sovereign immunity barred the petitioners' action here.

The waiver language in *Kletschka v. Driver*, 411 F.2d 436, 445 (2nd Cir. 1969), cited by petitioners at page 16, is only dicta, as the court specifically found apart from the waiver theory that the suit was of a type which "would not contravene sovereign immunity."

The case of *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970), (Pet. 15) (which, as petitioners point out, is contrary to an earlier decision in that court) involved an action to nullify the action of the Federal Aviation Administration in letting a contract to a bidder whose bid it was claimed did not conform to the bid requirements. It was simply an action by a federal official beyond the scope of his authority, *i.e.*, *ultra vires*, where sovereign immunity would not have been applicable even in the absence of the Act.

Thus, while there is some confusing language in the Court of Appeals cases cited for the Second and District of Columbia Circuits, such language was not necessary for the holdings in the cases and hence it is not a conflict of substance but a conflict of language with the case of *Blackmar v. Guerre*, *supra*, 342 U.S. 512 (1952), and the cases cited from the First, Fourth, Fifth, Eighth, Ninth and Tenth Circuits. All of the district court cases cited on page 16 of the petition also involve *ultra vires* actions by governmental officials which would not have been subject

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to the defense of sovereign immunity anyway. Hence the language in the opinions relating to the Administrative Procedure Act was not necessary and the cases are not significant in this regard.

Even though the language relating to the Act in the Second and District of Columbia Circuit cases can be distinguished on the ground that it was unnecessary to the decision as above described, there is one overriding reason why the decision of the Sixth Circuit in this case on sovereign immunity is not in conflict with the decisions of the Court of Appeals for the Second Circuit, the District of Columbia Circuit, or any other circuit on the question of the Administrative Procedure Act waiving sovereign immunity. No cases whatsoever have been cited by petitioners holding that the Administrative Procedure Act waives sovereign immunity when the relief requested cannot be granted merely by ordering the cessation of the conduct complained of but will require affirmative action by the sovereign disposing of unquestionably sovereign property, as would be the result in this case. There is no language in the A.P.A. which deals with an action which is, in substance, *in rem* against government property, rather than against an official of the Government who has exceeded express limits on his authority. There clearly is no conflict between the case at bar and any other Supreme Court or court of appeals case.

III

CONCLUSION

Certainly this is a case where no special or important reasons exist for granting certiorari. On the contrary, it is one where the public interest and justice will be greatly served by denying the petition.

The utilities relied on a broad unconditional legislative grant of authority in exchanging lands. Their obli-

gation to furnish much needed electric power compels them to continue to construct a generating plant on a small portion of the land received and the environmental effects are specifically considered by the agency controlling such construction. In fact, the environment is obviously benefited by the United States having nearly twice as much marsh area for wildlife refuge as it had prior to the exchange.

To permit a complaint to stand two and a half years after the exchange which merely challenges the desirability of the exchange in the opinion of the plaintiffs insofar as the general goals of wildlife protection are concerned, would not only be unjust and defeat congressional intent in giving the exchange authority, but it would also be contrary to the best established and narrowest concept of sovereign immunity. If sovereign immunity has any meaning, it is to protect a transaction such as this.

The petition for certiorari should be denied.

Respectfully submitted,

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